

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Based upon the entire record and for purposes of Preliminary Hearing, the Appeals Board finds as follows:

(1) Both of the foregoing issues, if disputed, are considered jurisdictional and subject to review by the Appeals Board. See K.S.A. 44-534a(a)(2).

The Administrative Law Judge in this Preliminary Hearing Order denied the claimant's request for workers compensation benefits, finding that the incident that occurred between June 12, 1994, and June 15, 1994, did not lead to the problems from which claimant now suffers. The Administrative Law Judge went on to find that other motivations and other circumstances led to claimant's problems.

It is the claimant's burden to establish his right to compensation and to prove the various conditions on which such right depends. See K.S.A. 44-501(a). In the present case, the claimant has established through his testimony that while working for the respondent he was hit in the knee by swinging tongs weighing approximately two hundred (200) pounds, which knocked him down landing him on his buttocks. The claimant's supervisor, DeWayne Chism, testified he specifically remembers the incident when the claimant was knocked down by the tongs. Additionally, claimant's fellow worker, Laverne R. Wilcox, testified that prior to the claimant being discharged because of absenteeism, claimant had complained about his leg numbing and his shoulder hurting. As a result of this accident, claimant further testified that he was still having problems with his low back and right leg hurting.

Medical records which were introduced by the claimant at the Preliminary Hearing, established that the claimant first sought treatment on July 12, 1994, with his family doctor, Robert Shively, M.D., who prescribed pain medication and ordered him not to work. Claimant eventually was treated by Dr. C. Reiff Brown, an orthopedic surgeon in Great Bend, Kansas, on July 25, 1994. Dr. Brown's records indicate claimant accurately described his work related accident he had while working for the respondent. Dr. Brown was treating the claimant's lower back pain with injections, physical therapy program, and an exercise program. It is Dr. Brown's opinion that the claimant was temporarily totally disabled.

After reviewing the whole record and arguments of the parties, the Appeals Board finds for purposes of Preliminary Hearing that more probably than not the claimant, sometime between June 12, 1994, and June 15, 1994, suffered a personal injury by accident that arose out of and in the course of his employment with respondent. The Appeals Board also finds, pursuant to K.S.A. 44-520, that the respondent's supervisor, DeWayne Chism witnessed the accident that is the subject of this claim and the claimant's responsibility to give notice of such accident is therefore not necessary.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge George R. Robertson's Preliminary Hearing Order, dated September 26, 1994, is reversed and an Order is entered by the Appeals Board finding that the claimant did suffer a personal injury by accident arising out of and in the course of his employment with the respondent. The Appeals Board further orders this case remanded to Administrative Law Judge George R. Robertson for appropriate findings

based on the evidence contained in the preliminary hearing proceedings, in regard to claimant's request for temporary total disability benefits and medical treatment.

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard A. Boeckman, Attorney at Law, Great Bend, KS
Mickey W. Mosier, Attorney at Law, Salina, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director